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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ALBERT HESS,
Petitioner,
v.
PORT AUTHORITY TRANS-HUDSON CORPORATION,
Respondent.

CHARLES F. WALSH,
Petitioner,
v.
PORT AUTHORITY TRANS-HUDSON CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Railway Labor Executives' Association ("RLEA") is an unincorporated association comprised of the chief executive officers of the following labor organizations: American Train Dispatchers (Dept. of BLE); Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employes; Brotherhood of Railroad Signalmen; Hotel and Restaurant Employees International

Union; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; International Longshoremen's Association; and Sheet Metal Workers International Association. These organizations represent a large portion of unionized railroad employees in the United States, as well as on the Port Authority Trans-Hudson Corporation ("PATH").

All of these organizations' members who work for railroads are protected by the Federal Employers' Liability Act, 45 U.S.C. §§51 *et seq.* ("FELA") as well as by the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"). Thus, whether or not PATH is protected by the Eleventh Amendment is important to all PATH employees and their labor representatives. More particularly, the labor organizations are keenly interested in assuring that PATH employees who may reside in New Jersey and prefer to bring an action in a district court in their home state, are entitled to the same statute of limitations as their counterparts who live in New York and prefer to bring an action in a district court in their home state. In short, as representatives of PATH employees, the members of the RLEA are acutely concerned about the disparate treatment that occurs among employees when there is a lack of uniformity in the application of the law as it applies to employees of the same employer. Moreover, the Court's analysis of whether PATH is protected by the Eleventh Amendment will be important in providing the framework for determining if railroads run by other state-created entities are immune from suit under FELA and the RLA. Accordingly, RLEA respectfully submits this brief as *amicus curiae* in support of Petitioners.[1]

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[1] This brief is presented with the permission of the parties pursuant to Rule 37.3 of the rules of this Court.

SUMMARY OF ARGUMENT

The protection provided by the Eleventh Amendment to "one of the United States" applies to an entity other than a state only if the entity is found to be an arm of the state. Given that the underlying purpose for the Eleventh Amendment was to protect the states from claims against their treasuries, the rule that has evolved is that the Eleventh Amendment protects a state-created entity from suit by private parties if a liability judgment must be paid from the state treasury. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Conversely, if the judgment against the state-created entity does not result in a judgment against the state, then the "purpose of the immunity . . . largely disappears." *Jacintoport Corp. v. Gr. Baton Rouge Port Comm'n*, 762 F.2d 435, 440 (5th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986).

In determining whether an entity is an arm of the state, a number of the courts of appeals have focused on the purpose underlying the Eleventh Amendment to conclude that the most important factor in determining whether a state-created entity is entitled to Eleventh Amendment protection is whether the state is legally liable for judgments against the state-created entity. Following this Court's analysis in *Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391 (1979), the courts of appeals also have examined a number of other factors, including (1) how state law characterizes the entity; (2) whether the entity has the power to sue and be sued; (3) whether the entity may enter into contracts in its name; (4) whether the entity has the authority to hold and use property; (5) whether the entity's property is subject to taxation; (6) whether the entity has the power of eminent domain; and (7) whether the state has resorted to a law suit in an attempt to enforce its will upon the agency.

When the factors are applied to the Port Authority of New York and New Jersey ("Port Authority") and its subsidiary, PATH,[2] it is abundantly clear that the Port

Authority and PATH are not arms of the state. The critical and most important factor in determining immunity—whether the state treasuries will be liable for any judgment rendered against PATH—weighs heavily against finding that PATH is immune to suit under the Eleventh Amendment. Significantly, PATH is prohibited from pledging the credit of the state or imposing any obligation on the state. Moreover, the states gave the Port Authority the full authority to issue bonds in order to raise revenues. Only one provision in the "Compact Between New York and New Jersey Creating Port Authority of New York and New Jersey" (N.Y. UNCONSOL. LAW §§ 6401-6423 (McKinney 1979)) [hereinafter referred to as Bi-State Compact] pertains to the appropriation of funds to the Port Authority and PATH. That provision provides that the state legislatures shall appropriate up to $100,000 annually to assist with administrative expenses; however, any appropriation must be approved by the governors of both states. Thus, the liability is subject to three limitations: it must be for administrative expenses, it must not exceed $100,000, and it must be approved by the states' governors. In short, any payment for judgments against PATH would be purely discretionary. The fact that a state might voluntarily agree to pay a judgment is not a basis for according an entity Eleventh Amendment immu-

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[2] PATH, a wholly owned subsidiary of the Port Authority, operates a passenger railroad between the states of New York and New Jersey within the Port District, which is a 1,500 square mile area in the New York Harbor area. PATH is entitled to " 'all of the privileges, immunities, tax exemptions and other immunities of the port authority' and is subject to suit to the same extent as the Authority." *Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299, 301 (1990) (*"Feeney"*), *quoting and citing* NJ Stat Ann § 32:1-35.61 (West 1963); N.Y. UNCONSOL. LAW § 6612 (McKinney 1979). PATH, therefore, is subject to Eleventh Amendment protection to the same extent as the Port Authority; accordingly, unless otherwise noted, the attributes of the Port Authoriy will also be presumed to be attributes of PATH and the two entities will be used interchangeably throughout this brief.

nity. Furthermore, the payment of $100,000 is clearly not the level of financial commitment that the courts have found constitutes a basis for finding immunity.

Moreover, the facts in this case show that the states created the Port Authority with the intention that it would be financially self-sustaining, and since approximately 1934 it has achieved that goal. Indeed, in 1991 the Port Authority reported that its revenues exceeded expenses by $519,489.00 and that it earned approximately $74.8 million on its investments. In short, it is exceedingly unlikely that the states would ever be called upon to voluntarily contribute to any judgment against the Port Authority or PATH.

The remaining factors also militate against finding immunity for PATH. The states and the Port Authority refer variously to the Port Authority and, derivatively, to PATH as a body corporate and politic, a municipal instrumentality, and a political subdivision. All of these terms suggest that the states did not intend for PATH to be an arm of the state. In addition, the factors showing the extent of autonomy that PATH exercises also weigh in favor of a finding that PATH is not entitled to Eleventh Amendment protection. Thus, although there is some oversight of PATH in that the Board of Commissioners of the Port Authority and PATH are appointed by the states, the Board is required to submit an annual report to the states, and its decisions are subject to the veto of either governor, it is clear that the states have imbued the Port Authority and PATH with many attributes of autonomy that are not associated with an alter ego of the state. Thus, in order to perform the many responsibilities associated with planning, developing, and operating transportation facilities, as broadly defined in the Bi-State Compact, the Port Authority, and, derivatively, PATH have full power and authority with respect to tolls, fares, fees and other charges. In addition, PATH has full power and authority to purchase, lease and sell real property; to enter into contracts; and to sue and be sued.

Where, as here, the Bi-State Compact and other enabling legislation indicates that the states created an agency comparable to a political subdivision, immunity should not be granted for, as the Court stated in *Lake County Estates*, 440 U.S. at 401:

> Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the Amendment.

An analysis of the attributes of PATH provides no good reason for believing that the states intended to confer Eleventh Amendment immunity upon PATH.

ARGUMENT

I. THE PURPOSE FOR WHICH THE ELEVENTH AMENDMENT WAS CREATED—TO MINIMIZE FEDERAL ADJUDICATION THAT WOULD INVADE THE STATE TREASURIES WITHOUT THEIR CONSENT—WEIGHS AGAINST APPLYING IMMUNITY TO PATH BECAUSE A JUDGMENT AGAINST PATH WOULD NOT SUBJECT THE STATES TO INVOLUNTARY LIABILITY

A. The Purpose Underlying The Eleventh Amendment Provides The Framework For Analyzing Whether A State-Created Entity Is An Arm Of The State And Entitled To Eleventh Amendment Protection

The factual basis leading to the adoption of the Eleventh Amendment underscores the very purpose for which the Eleventh Amendment was created. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793) the Supreme Court held that federal courts had jurisdiction to hear a claim by two South Carolina citizens, on behalf of a British creditor, against the State of Georgia. An outcry arose from the states for they were not only concerned that this holding would threaten the dignity of the states but also that it would subject them to unlimited liability to creditors' claims. *Edelman v. Jordan*, 415 U.S. 651, 662 (1974); *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 276 n.1 (1959); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 97-98 (1984). Congress passed the Eleventh Amendment in direct response to the *Chisholm* decision. *Id.*

The Eleventh Amendment states:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The immunity granted in the Eleventh Amendment is limited by its terms to "one of the United States." *Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391, 400 (1979). This Court has, however, held that immunity applies even though the party being sued is not "one of the United States" if (1) "the entity being sued is so intricately intertwined with the State that it can best be understood as an 'arm of the State' "; or (2) if "the State, though not a nominal party, is the real party in interest." *Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299, 311-312 (1990) (Brennan, J., concurring).

The Court consistently has denied Eleventh Amendment immunity "to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.' " *Lake Country Estates*, 440 U.S. at 401. Entities that do exercise state power "have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." *Id.* at 400-401. Thus, the rule that has evolved from the passage of the Eleventh Amendment is "that a suit by private parties seeking to impose a liability which must be paid from public funds in the

state treasury is barred by the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. at 663, *citing Great N. Life Insurance Co. v. Read*, 322 U.S. 47 (1944); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946).

The Courts of Appeals have, in turn, consistently held that the extent to which the state is responsible for funding the entity, together with its legal liability for judgments against the entity, is the most important factor in determining whether an entity is protected by the Eleventh Amendment as an arm of the state. *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth.*, 991 F.2d 935, 939 (1st Cir. 1993); *Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807, 815 (3d Cir. 1991) (*en banc*), *cert. denied*, 112 S. Ct. 2281 (1992);[3] *Durning v. Citibank*, 950 F.2d 1419, 1424 (9th Cir. 1991); *Feeney v. Port Auth. Trans-Hudson Corp.*, 873 F.2d 628, 631 (2d Cir. 1989), *aff'd on other grounds*, 495 U.S. 299 (1990); *Morris v. Washington Metropolitan Area Transit Auth.*, 781 F.2d 218, 227 (D.C. Cir. 1986); *Jacintoport Corp. v. Gr. Baton Rouge Port Comm'n*, 762 F.2d 435, 441 (5th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986). When an examination of the financial autonomy of the state entity reveals that

[3] While *Bolden* is the most recent of the Third Circuit decisions stating this principle, it is not the first. As the *Bolden* court noted, 953 F.2d at 816, it followed the analysis previously articulated in *Fitchik v. New Jersey Transit Rail Operations*, 873 F.2d 655 (3d Cir.), *cert. denied*, 493 U.S. 850 (1989); *Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. and N.J.*, 819 F.2d 413 (3d Cir.), *cert. denied*, 484 U.S. 953 (1987); *Kovats v. Rutgers, The State Univ.*, 822 F.2d 1303 (3d Cir. 1987); *Blake v. Kline*, 612 F.2d 718 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); *Urbano v. Board of Managers*, 415 F.2d 247 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970). The list of factors in the earlier cases states that whether payment will come from the state treasury is one of the more important factors; in its 1989 *Fitchik* decision, 873 F.2d at 659, however, the court emphasized that "whether any judgment would be paid from the state treasury" was the *most important* question.

"a judgment against the entity does not entail a judgment against the state," then the "purpose of the immunity . . . largely disappears." *Jacintoport*, 762 F.2d at 440. Indeed, it is primarily because of the difference in the way in which the Third and Second Circuits have viewed the extent to which the states of New Jersey and New York are responsible for PATH's financial obligations, particularly a money judgment against it, that has led to the split in those circuits on whether PATH is entitled to Eleventh Amendment protections.

B. The States Of New York And New Jersey Neither Fund PATH's Operations Nor Are Involuntarily Liable For A Judgment Against PATH, And Therefore, PATH Is Not Protected By The Eleventh Amendment

1. *PATH Is Prohibited From Pledging The Credit Of The States Or Imposing Any Obligations On The States*

The provisions of the Bi-State Compact compel the conclusion that the states of New York and New Jersey would be liable for a judgment against the Port Authority or its subsidiary, PATH, only if they affirmatively and voluntarily agreed to such liability. Article VII of the Bi-State Compact provides that (N.Y. UNCONSOL. LAW § 6408 (McKinney 1979), Pet. App. 47a)[4]:

> the port authority shall not pledge the credit of either state except by and with the authority of the legislature thereof.

[4] All references to Pet. App. are to the appendices attached to the Petition for a Writ of Certiorari filed by Albert Hess and Charles F. Walsh. Since the Bi-State Compact and other New Jersey legislation pertaining to the Port Authority is identical or virtually identical to the New York legislation, petitioners reproduced only the New York legislation in their appendices. Accordingly, references in this brief to the state legislation will be to the New York legislation that is reproduced in petitioners' appendices.

Legislation adopting the comprehensive plan for development of the Port Authority also states that the Port Authority (N.Y. UNCONSOL. LAW § 6459 (McKinney 1979), Pet. App. 49a-50a):

> shall have no power to pledge the credit of either state or to impose any obligation upon either state, or upon any municipality, except as and when such power is expressly granted by statute, or the consent by any such municipality is given.

Finally, THE PORT AUTHORITY OF N.Y. & N.J.—COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE YEAR ENDED DECEMBER 31, 1991 ("Comprehensive Financial Report") (Pet. App. 60a) states that the Port Authority does not have "the power to pledge the credit of either State or any municipality." The Bi-State Compact, bi-state legislation setting forth the plan for development, and the annual report for the Port Authority leave no doubt that the States of New York and New Jersey did not intend to be liable for any debts of the Port Authority or its subsidiary, PATH. The Ninth Circuit recognized that the unwillingness of a state to support a state-created entity with monies of the state suggests that the entity is not an arm of the state (*Durning*, 950 F.2d at 1426):

> Indeed, if the rationale underlying the Eleventh Amendment is to compel the federal judiciary's respect for a state's own sovereign constitutional authority, then the fact that a state feels compelled by its own constitution not to pledge its funds to support the obligations of a state entity counsels heavily against recognizing that entity as a sovereign arm of the state.

Thus, the states' clear disavowal of the Port Authority's liabilities, standing alone, makes it evident that the Port Authority and its subsidiary, PATH, are not arms of the state entitled to Eleventh Amendment protection. *See Metcalf & Eddy, Inc.*, 991 F.2d at 940.

2. *The States' Appropriations To The Port Authority For Administrative Expenses, Which Must Be Approved By The Governors And May Not Exceed $100,000 Annually, Have Been Unnecessary For Fifty Years, And, In Any Event, Are Not Intended To Satisfy Judgments Against The Port Authority Or PATH*

Despite the seemingly unambiguous nature of the language declaring that the Port Authority has no authority to incur liability on behalf of the States of New York and New Jersey, other language in the Bi-State Compact has proved to be more troubling for the two courts of appeals that have addressed the matter. Bi-State Compact Article XV provides that (N.Y. UNCONSOL. LAW § 6416 (McKinney 1979), Pet. App. 48a):

> Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority and approved by the governors of the two states, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year.

The Third Circuit relied upon this provision to conclude that "a judgment could have some impact on the state treasury." *Port Auth. Police Ben. Ass'n*, 819 F.2d at 416. Although the Third Circuit recognized that such a result was improbable, the Third Circuit viewed the language in Bi-State Compact Article XV as evincing an intent to provide financial support if it was ever needed. *Id.* Relying on this same language, the Second Circuit concluded that "the phrase 'salaries, office and other administrative expenses' clearly limits this essentially optional obligation of the two states to a very narrow category of expenses and thus also evidences an intent to insulate the states' treasuries from the vast bulk of the Port

Authority's operating and capital expenses, including personal injury judgments." *Feeney*, 873 F.2d at 631.

When Bi-State Compact Article XV is considered in the context of the overall financial arrangements that govern the Port Authority, the Second Circuit's conclusion that the states' underlying intent in creating the Port Authority was to divest themselves of any liability is more persuasive. The Comprehensive Financial Report unambiguously expresses the states' intentions regarding their financial liability for the Port Authority (Pet. App. 60a):

> The Compact envisions the Port Authority as being financially self-sustaining and, as such, it must raise the funds necessary for the construction or acquisition of facilities upon the basis of its own credit.

This statement is in accord with other statements made in the Comprehensive Financial Report regarding Port Authority expenses. Thus, the Report states that "[t]he costs of providing facilities and services to the general public on a continuing basis are recovered primarily in the form of tolls, fares, fees, rentals and other user charges." Pet. App. 62a. The Comprehensive Financial Report simply reflects the intent of the legislation, which provides that (N.Y. UNCONSOL. LAW § 6612 (McKinney 1979), Pet. App. 51a):

> All details of the effectuation, including but not limited to details of financing, leasing, rentals, tolls, fares, fees and other charges, rates, contracts and service, of the world trade center, the Hudson tubes and the Hudson tubes extensions by the port authority shall be within its sole discretion and its decision in connection with any and all matters concerning the world trade center, the Hudson tubes and the Hudson tubes extensions shall be controlling and conclusive.

The states' intent that the Port Authority be financially independent is further evidenced by Article VI of the Bi-State Compact (N.Y. UNCONSOL. LAW § 6407, Pet.

App. 46a), which gives the Port Authority the power to issue bonds.[6] The Comprehensive Financial Report echoes the intent that the Port Authority should be responsible for its own indebtedness for it states that "[t]he Port Authority finances construction and acquisition of its facilities primarily by issuing bonds, notes and other obligations and through application of its reserve funds." (Pet. App. 63a). Furthermore, as noted above, the legislation specifically provides that these bonds are not the obligations of either state. *See also Commissioner of Internal Revenue v. Shamberg's Estate*, 144 F.2d 998, 1001, 1007 (2d Cir. 1944), *cert. denied*, 323 U.S. 792 (1945). The authority to issue bonds and, thereby, finance its operations is an indicia of independence and separateness that weighs heavily in favor of finding that the entity is not an arm of the state. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977); *Feeney*, 495 U.S. at 313 (Brennan, J., concurring); *Metcalf & Eddy*, 991 F.2d at 942; *Durning*, 950 F.2d at 1428.

These provisions, when read together, leave no doubt that the States did not intend to assume liability for judgments against the Port Authority. Indeed, from a practical standpoint, there is little likelihood that the States of New York and New Jersey will ever face a decision regarding a judgment against PATH given that the Port Authority has been financially independent for decades. Thus, in 1931 the States of New York and New Jersey acknowledged the Port Authority's ability to sustain itself financially when they established a General Reserve Fund for the Port Authority, which was to be funded by the Port Authority's surplus revenues.[6] *See Port Auth. Police*

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[5] Although PATH itself does not have the authority to incur indebtedness, the Port Authority may transfer money or property to its subsidiaries. N.Y. UNCONSOL. LAW § 6612 (McKinney 1979), Pet. App. 52a.

[6] The surplus revenues from all the Port Authority's facilities are pooled into the General Revenue Fund and that fund serves as security for principal and interest on all bonds that the Port

Ben. Ass'n, 819 F.2d at 416. *See also* N.Y. UNCONSOL. LAW § 7002 (McKinney 1979) (Pet. App. 54a-55a). Moreover, the 1991 Comprehensive Financial Report shows that the Port Authority earned $47,165,000 on its long term investments and $27,649,000 on its short term investments in 1991, resulting in a total return on investments of $74.8 million in one year alone. (Pet. App. 61a). In addition, the Port Authority's revenues exceeded its expenses in 1991 by $519,489. (Pet. App. 60a.) Finally, the Port Authority carries insurance to protect itself against liabilities and has a self-insurance program to cover uninsured losses.[7] In short, it is virtually beyond the realm of possibility that PATH would incur judgments that would exceed its ability to pay.

Moreover, even assuming the possibility, as the Third Circuit did, that the Port Authority could expend all its monies on judgments against it and, therefore, be unable to meet its administrative expenses, Bi-State Compact Article XV does not, as the Third Circuit found, impose liability on the states. First, the Third Circuit's scenario assumes that the Port Authority will use its monies to pay its liabilities and turn to the states for assistance with its administrative expenses. Assuming that to be the case, the Port Authority will not be seeking monies to pay a judgment, which is the requirement for Eleventh Amendment protection. On the other hand, if the Port Authority uses its monies to pay its administrative expenses and turns to the states for assistance in paying its judgments,

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Authority issues. *United States Trust Co. of N.Y. v. State*, 338 A.2d 833, 842 (N.J. Super. Ct. 1975), *aff'd* 353 A.2d 514 (N.J. Sup. Ct. 1976), *rev'd on other grounds*, 431 U.S. 1 (1977). In 1931, the states also transferred the operation and control of the Holland Tunnel to the Port Authority. *Id.*

[7] A number of the courts of appeals, including the Third Circuit, have found this factor significant in other cases. *See, e.g., Bolden*, 953 F.2d at 819; *Barket, Levy & Fine v. St. Louis Thermal Energy*, 948 F.2d 1084, 1087 (8th Cir. 1991); *Fitchik*, 873 F.2d at 661; and *Royal Caribbean v. Puerto Rico Ports Auth.*, 973 F.2d 8, 11 (1st Cir. 1982).

it will not be seeking monies for administrative expenses, the only expenses that are authorized by Article XV of the Bi-State Compact.

Second, the use of the phrase "[u]nless and until" in Article XV of the Bi-State Compact suggests that any appropriations authorized under Article XV were meant to provide monies for administrative expenses during the start-up period *until* such time as revenues were adequate to cover expenditures. It is questionable whether the "unless and until" language of Article XV was meant to apply some seventy years after the start-up period of the Port Authority. Indeed, it appears that the Port Authority has been financially self-sustaining since approximately 1934. *See Shamberg's Estate*, 144 F.2d at 1002.

Third, the Third Circuit's finding that Article XV of the Bi-State Compact mandates that the states provide whatever monies are necessary for the Port Authority to meet its operating expenses focuses only on the first step in the funding process. Under the two-step funding process in Article XV, the States of New York and New Jersey are liable for the Port Authority's or PATH's expenses only if the governors of the two states approve the appropriation. In short, any payment of monies from the states to the Port Authority or PATH is discretionary. As the Third Circuit has recognized, "voluntary payments by a state do not trigger sovereign immunity." *Fitchik*, 873 F.2d at 661. *Accord Barket, Levy & Fine*, 948 F.2d at 1087. Indeed, the Third Circuit observed that even though a state "might feel compelled as a practical matter to subsidize a variety of entities that provide necessary services, . . . [s]uch discretionary subsidies committed in reaction to a judgment, however, would not necessarily transform the recipients into alter egos of the state." *Bolden*, 953 F.2d at 819. *See also Durning*, 950 F.2d at 1425 n.3 ("the fact that a state may ultimately *volunteer* to pay the judgment . . . is immaterial; the question is whether the state treasury is legally obligated.").

Finally, it is significant that even if Article XV of the Bi-State Compact mandated state expenditures on behalf of the Port Authority, the states may only give the Port Authority $100,000 in any year. This Court has denied Eleventh Amendment immunity even though the entity received a "significant amount of money" from the state. *Mt. Healthy*, 429 U.S. at 280. In cases not involving the Port Authority, the Third Circuit has found that the entity was not entitled to Eleventh Amendment protection even when the state provided the entity wih funding in excess of $1 million (*Fitchik*, 873 F.2d at 660), or when the state provided 27% of the entity's revenues (*Bolden*, 953 F.2d at 819).[8] In other words, even if the states paid $100,000 to the Port Authority, that would not be the kind of funding that would lead to a finding that the Port Authority's money comes predominantely from the states. *Compare Washington Metropolitan Area Transit Auth.*, 781 F.2d at 226 (court viewed $42 million appropriation by State of Virginia in two-year period as substantial).

Where, as here, the states are under no obligation to pay PATH's debts or its judgments, and where the states may, in their discretion, appropriate no more than $100,000 in a given year towards administrative expenses, it seems clear that the purpose of Eleventh Amendment immunity is not present and PATH should not be "entitled to partake of the state's immunity." *Fitchik*, 873 F.2d at 660.

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[8] In *Shamberg's Estate*, 144 F.2d at 1002, the Second Circuit noted that the states discontinued the annual appropriations in 1934 because by then revenues were sufficient to meet expenses. By 1944, the date of the decision, the states had provided about $21,500,000 in advances and appropriations, which amounted to only about 10% of the total expenditures of $233,500,000. *Id.* at 1007 & n.4 (Frank, J., dissenting).

II. OTHER FACTORS RELATING TO PATH'S STRUCTURE AND FUNCTION CONFIRM THAT PATH IS NOT AN ARM OF THE STATE AND, THEREFORE, IS NOT PROTECTED BY THE ELEVENTH AMENDMENT

In addition to the issue of whether a state would be liable for any judgment against a state-created entity, the courts of appeals have, on the basis of the Court's analysis in *Lake Country Estates*, reviewed other aspects of the entity's structure and function to determine the status of state-created entities. *Metcalf & Eddy*, 991 F.2d at 939-940; *Robinson v. Georgia Dept. of Transp.*, 966 F.2d 637, 638 (11th Cir.), *cert. denied*, 113 S. Ct. 660 (1992); *Bolden*, 953 F.2d at 818; *Durning*, 950 F.2d at 1423; *Barket, Levy & Fine*, 948 F.2d at 1087; *Farias v. Bexar Cty. Bd. of Trustees*, 925 F.2d 866, 874 (5th Cir.), *cert. denied*, 112 S. Ct. 193 (1991). For the most part, the circuit courts have considered the following factors: (1) how state law characterizes the entity; (2) whether the entity has the power to sue and be sued; (3) whether the entity may enter into contracts in its name; (4) whether the entity has the authority to hold and use property; (5) whether the entity's property is subject to taxation; (6) whether the entity has the power of eminent domain; and (7) whether the state has resorted to a law suit in an attempt to enforce its will upon the agency. As we show below, these factors considered in the aggregate support a finding that PATH is not an arm of the state and, therefore, not entitled to immunity under the Eleventh Amendment.

A. The Enabling Legislation, As Well As The Entity's Own Characterization Of Its Status, Show That The Port Authority Is Not An Arm Of The States But Rather Is More Akin To A Political Subdivision

The Bi-State Compact consistently characterizes the Port Authority in a manner that suggests that the states did not intend for the Port Authority to be an arm of

the states. Article III of the Bi-State Compact, states that the Port Authority is hereby created and states that it "shall be a body corporate and politic." N.Y. UNCONSOL. LAW § 6404 (McKinney 1979), Pet. App. 45a. Article VI of the Bi-State Compact also states that the Port Authority "shall constitute a body, both corporate and politic." N.Y. UNCONSOL. LAW § 6407 (McKinney 1979), Pet. App. 46a. In its decision finding that the Port Authority was an arm of the state, the Third Circuit acknowledged that the term "body corporate and politic" "suggests vulnerability to suit under section 1983." *Port Auth. Police Ben. Ass'n*, 819 F.2d at 415. Similarly, the Eighth Circuit in *Barket, Levy & Fine,* 948 F.2d at 1087, found that the term "body corporate and politic" indicated that the interstate agency in that case was a municipal corporation. *See also Durning*, 950 F.2d at 1427 (entity referred to as "body corporate" in enabling legislation clearly has its own independent corporate identity).

Similarly, the comprehensive plan, enacted by the states, refers to the Port Authority in terms suggesting that it is not an arm of the state. Thus, the legislation states that the Port Authority "shall be regarded as the municipal corporate instrumentality of the two states." N.Y. UNCONSOL. LAW § 6459, Pet. App. 49a. Significantly, in its Comprehensive Financial Report, the Port Authority admits that it is "a municipal corporate instrumentality and political subdivision of the States of New York and New Jersey . . . ." (Pet. App. 59a).[9] A political subdivision is undisputedly not entitled to immunity. *Lake Country Estates*, 440 U.S. at 401. Although the Third Circuit viewed the language "municipal corporate instrumentality" as suggesting "nothing definite in either direction" (*Port Auth. Police Ben. Ass'n*, 819 F.2d at 415), the Second Circuit viewed the use of that term as

[9] The Comprehensive Financial Report also refers to the Port Authority as a "public corporation serving the people of the New York-New Jersey metropolitan region." (Pet. App. 60a).

"[f]avoring the non-application of the Eleventh Amendment immunity to PATH." *Feeney*, 973 F.2d at 631.

Finding that the statutory language does not conclusively establish that the Port Authority is an arm of the state, the Third Circuit relied on a number of decisions in which the state courts concluded that the Port Authority is "a state agency performing functions on behalf of the state." *Port Auth. Police Ben. Ass'n*, 819 F.2d at 415. However, in a subsequent decision, the Third Circuit, sitting *en banc*, stated that "a state law determination of sovereign immunity may coincide with and influence the federal law determination of Eleventh Amendment status, but the former does not conclusively determine the latter." *Bolden*, 953 F.2d at 815. In any event, the decisions upon which the Third Circuit relied did not address the question of whether the states would be legally liable for money judgments against the Port Authority and, therefore, failed to address the issue critical to determining Eleventh Amendment immunity. *See Jacintoport*, 762 F.2d at 438, 440 (Fifth Circuit refused to rely on state court decisions that addressed only a few of the factors that must be weighed in determining Eleventh Amendment immunity).

In sum, the states' characterization of the Port Authority as a "body corporate and politic" and the Port Authority's own admission that it is a "municipal corporate instrumentality and political subdivision of the states of New York and New Jersey" unambiguously demonstrate that the Port Authority, and derivatively, PATH are not arms of the state. In any event, even if the legislation could be viewed as characterizing PATH as a governmental entity, such characterization cannot "confer Eleventh Amendment immunity absent a binding and ongoing commitment to absorb a substantial portion of that entity's operating deficit." *Washington Area Metropolitan Area Transit Auth.*, 781 F.2d at 228 (Wright, J. concurring).

B. Factors Relating To The Level Of PATH'S Autonomy Also Suggest That PATH Is Not An Arm Of The States

The autonomy that the Port Authority has in performing the functions for which it was created weigh in favor of denying the Port Authority immunity under the Eleventh Amendment. Article VI of the Bi-State Compact gives the Port Authority "full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within [the Port District]; and to make charges for the use thereof." N.Y. UNCONSOL. LAW § 6407, Pet. App. 46a. According to the Bi-State Compact, transportation facilities include (N.Y. UNCONSOL. LAW § 6423 (McKinney 1979):

> railroads, steam or electric, motor truck or other street or highway vehicles, tunnels, bridges, boats, ferries, car-floats, lighters, tugs, floating elevators, barges, scows or harbor craft of any kind, air craft suitable for harbor service, and every kind of transportation facility now in use or hereafter designed for use for the transportation or carriage of persons or property.

In addition to the broad authority given the Port Authority by virtue of the expansive definition of the term "transportation facility," the Port Authority is vested with all necessary and appropriate powers needed to develop the port of New York (N.Y. UNCONSOL. LAW § 6459, Pet. App. 49a). In order to carry out these broad responsibilities, the Port Authority has sole discretion with respect to the "details of financing, leasing, rentals, tolls, fares, fees and other charges, rates, contracts and service." (N.Y. UNCONSOL. LAW § 6612, Pet. App. 51a).

Moreover, to ensure that the Port Authority can successfully "plan, develop, and operate terminals and other facilities of transportation and commerce" (Pet. App. 59a) in the Port District, the states have given the Port Authority other powers that are indicia of independence from the state. Significantly, the Port Authority has the

right to sue and to be sued (N.Y. UNCONSOL. LAW §§ 6466, 6612, Pet. App. 50a, 53a). The Ninth Circuit has noted that an entity which has the authority to sue or be sued in one's own name strongly suggests that the entity has "the organizational autonomy and legal independence" necessary to find that the entity is not an arm of the state. *Durning*, 950 F.2d at 1427 n. 4. *See also Belanger v. Madera Unified School Dist.*, 963 F.2d 248 (9th Cir. 1992), *cert. denied*, 122 L.Ed.2d 674 (1993) (that school district can sue and be sued militates against immunity).

PATH also has authority (1) "to own, hold, lease and/operate real or personal property" (N.Y. UNCONSOL. LAW §§ 6407, 6951 (McKinney 1979), Pet. App. 46a, 54a); and (2) to enter into contracts (N.Y. UNCONSOL. LAW § 6612 (McKinney 1979), Pet. App. 51a-54a) ("all details of the effectuation, including . . . contracts . . . shall be within its sole discretion . . ."). The authority to undertake these responsibilities is also an indication of independence from the state. *Metcalf & Eddy*, 991 F.2d at 942; *Royal Caribbean*, 973 F.2d at 11; *Durning*, 950 F.2d at 1427; *Fitchik*, 873 F.2d at 663.

Significantly, neither the Port Authority nor PATH have the authority to levy taxes or assessments. (N.Y. UNCONSOL. LAW § 6459 (McKinney 1979), App. 49a). Since the power to tax is "perhaps the most important power possessed by the State" (*Shamberg's Estate*, 144 F.2d at 1004), it seems clear that the states did not intend PATH to be an alter ego of the states.

As the Court noted in *Lake Country Estates*, 440 U.S. at 402, one of the more "forceful demonstrations" of an agency's autonomy is indicated by the fact that the state has to engage in litigation in an attempt to impose its will upon the entity. Such a demonstration exists with respect to the states' relationship with the Port Authority. Thus, in *People v. Port of New York Auth.*, 315 N.Y.S.2d 9

(1970), the State of New York sued the Port Authority in an attempt to force it to discontinue polluting the water.

Another equally compelling example of the inability of the States of New York and New Jersey to impose their will on the Port Authority is revealed in the history of a dispute that resulted in this Court's decision in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). The dispute that culminated in the Court's decision in *United States Trust Co.* was between the United States Trust Company, as trustee for the holders of Port Authority bonds, and the State of New Jersey, and concerned a 1962 statutory covenant and its subsequent repeal. However, the history leading to the 1962 statutory covenant and its subsequent repeal reveals a great deal about the states' abilities to direct the actions of the Port Authority. As the lower court's decision in *United States Trust Co.* reveals, the states were desperately seeking a solution to the mass transportation problems that were causing havoc in the states. *See United States Trust Co. of N.Y. v. State*, 338 A.2d 833, 847 (N.J. Super. Ct. 1975). Despite the Port Authority's broad authority over transportation facilities and the Port District, the Port Authority persisted in its refusal to assume responsibility for commuter transportation, primarily because of the projected deficit involved in operating commuter transit. *United States Trust*, 338 A.2d at 848. In 1958, the Port Authority not only lobbied vigorously against a bill introduced in the New Jersey legislature which directed the Port Authority to take responsibility for interstate rail mass transit between New Jersey and New York but retaliated by including a new safeguard in its bonds that prevented using the General Reserve Fund to secure bonds for new facilities unless the "Port Authority first certified that the issuance of the bonds would not 'materially impair the sound credit standing' of the Port Authority." *United States Trust Co.*, 431 U.S. at 8. *See also United States Trust Co.*, 338 A.2d

at 848. The Port Authority's action effectively stopped the passage of the 1958 bill. 338 F.2d at 848-49.[10]

Commuter transit problems continued to mount and by 1960 an immediate concern was the continued operation of the bankrupt Hudson & Manhattan Railroad ("H&M"). In order to placate the Port Authority's concerns about its credit ratings and the perception of its bondholders, the legislatures searched for a way that the Port Authority could take over operations of the H&M without becoming further involved in the deficits of the commuter railroads. 338 A.2d at 849. The result was the passage of the 1962 Covenant. *Id.* at 849-855. The Port Authority relied on the 1962 Covenant as justification for refusing to increase its role in mass transportation. *Id.* at 859. Ultimately, repeal of the 1962 Covenant proved to be a necessary part of the states' efforts to get the Port Authority and PATH to assume more responsibility for mass transit in the Port District. *Id.* at 857-863. In short, despite the determined efforts of the state legislatures, the Port Authority was able to delay its assumption of responsibility for rapid transit between New Jersey and New York for many years. *See United States Trust Co.*, 353 A.2d at 530-532 (Peshman, J., concurring in part and dissenting in part).

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[10] Interestingly, the Third Circuit distinguished the Port Authority from the New Jersey Transit on the basis that the Port Authority had to obtain authorization from the states of New Jersey and New York in order to undertake a new project. *Fitchik*, 873 F.2d at 664. While this may be so, it is a double-edged sword for as the facts in *United States Trust Co.* show, the states were forced to resort to legislation to force the Port Authority to undertake a project, even though it presumably came within the Port Authority's jurisdiction under the terms of the Bi-State Compact.

C. The Indicia Of Sovereignty That Militate In Favor Of Immunity For PATH And The Port Authority Are Outweighed By The Overwhelming Indicia Against Immunity

Tempering the list of attributes that suggest that PATH is not an arm of the state are the following factors relating to PATH's autonomy which traditionally suggest immunity under the Eleventh Amendment: (1) bonds or other securities issued by the Port Authority are free from taxation by either state (N.Y. UNCONSOL. LAW § 6459 (McKinney 1979), Pet. App. 49a); (2) the Port Authority, and derivatively, PATH have the power of eminent domain and condemnation (N.Y. UNCONSOL. LAW § 6516 (McKinney 1979); (3) the Port Authority, as well as PATH, are exempt from paying property taxes (N.Y. UNCONSOL. LAW § 6611 (McKinney 1979); (4) each of the states appoints six of the twelve members of the governing Board of Commissioners, who are then subject to confirmation by the respective State Senate (N.Y. UNCONSOL. LAW § 6405 (McKinney 1979), App. 59a); (5) the governors of the two states have the right to veto PATH's actions (N.Y. UNCONSOL. LAW § 6612 (McKinney 1979), App. 53a); and (6) the Port Authority and derivatively, PATH must make annual reports to the legislature of both states, setting forth the operations and transactions conducted by it (N.Y. UNCONSOL. LAW § 6408 (McKinney 1979), App. 47a).

The first factor should be entitled to little weight since bonds issued by counties and municipalities, which are clearly not arms of the states, are also frequently exempted from taxes by the states. Indeed, as indicated in *Shamberg's Estates*, 114 F.2d at 1003, interest on bonds issued by political subdivisions, also not considered to be arms of the state, are exempt from federal taxation.[11]

[11] In *Shamberg's Estate*, the court found that the Port Authority was a political subdivision under the federal tax regulations. The regulations define a political subdivision to include "special assessment districts . . . such as road, water, sewer, gas,

Similarly, even though PATH is exempt from taxation on its real property, the legislation provides that "no municipality shall suffer undue loss of taxes and assessments by reason of the acquisition and ownership of property by the port authority" and empowers PATH to agree to pay the municipalities a sum "in lieu of taxes" that shall be no more than the amount that the previous owner paid in taxes to the municipality. N.Y. UNCONSOL. LAW § 6611 (McKinney 1979). With respect to the powers of eminent domain, the Third Circuit acknowledged in *Fitchik*, 873 F.2d at 663, that the power of eminent domain "does not mean that [a state-created entity] is necessarily entitled to [E]leventh [A]mendment immunity" and noted that counties and municipalities in New Jersey also exercise that power.

The final three factors relate to the control and influence that the states have over PATH. In *Barket, Levy & Fine*, 948 F.2d at 1088, the Eighth Circuit reasoned that even though the governors of the two states appointed the commissioners to the bi-state entity, the governors had the right of veto, the bi-state entity had to provide an annual report to the governor,[12] and the states had the right to approve the bi-state entity's development plans, the states' control over the bi-state entity was "not unlike the control states have over counties." Relying instead on the fact that the states were not responsible for funding the bi-state entity and were not legally obligated for its liabilities and obligations, the court held that the bi-state entity was not an arm of the state. *Id.* Similarly, when the factors suggesting sovereignty are balanced against

light, reclamation, drainage, irrigation, levee, school, harbor, port improvement, and similar districts and divisions of the State." 144 F.2d at 1005.

[12] The requirement that PATH submit an annual report can be equated with the requirement that municipal corporations, which are clearly not arms of the state, submit annual reports of their financial condition to the comptroller. N.Y. GEN. MUN. LAW § 30 (McKinney 1986).

the great degree of autonomy the Port Authority is given in carrying out the functions for which it was created, and that it and it alone is liable for judgments against it, the balance is tilted towards those factors that suggest that the Port Authority, and, therefore, PATH are not protected by the Eleventh Amendment.

In finding that the Port Authority is entitled to Eleventh Amendment immunity, the Third Circuit also concluded that its functions were governmental and not proprietary. Although the governmental-proprietary distinction is no longer a valid basis for determining Eleventh Amendment immunity (*Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985); *Fitchik*, 873 F.2d at 659 n.2), it deserves mention that other courts have reached a different view regarding the responsibilities assigned to the Port Authority and PATH.

In *Royal Caribbean*, 973 F.2d at 10, the court concluded that the Puerto Rico Ports Authority, which was charged with " 'own[ing], operat[ing], and manag[ing] . . . transportation facilities' . . . , including the 'public property docks' " and with charging fees for the use of the docks, was engaged in proprietry activities rather than governmental activities. Here too, the Port Authority and PATH charge for their services and those revenues substantially contribute to paying the expenses of the operations. Similarly, the operation of bridges and tunnels is "often undertaken by privately-owned public utility companies." *Shamberg's Estate*, 144 F.2d at 1007 (Frank, J., dissenting). Finally, it should be noted that in *State v. Kirk*, 201 A.2d 102, 105 (Essex Cty. Ct. 1964), *aff'd* 211 A.2d 200 (N.J. Super. Ct. 1965), the court found that "the operation and conduct of the airport facilities in the City of Newark by the Port Authority are akin to that of a private business operation" and, therefore, "the Port Authority, in the same manner as a private owner of property, may protest and prosecute a trespass on its premises."

Related to the issue of what functions PATH performs is the issue of the geographical boundaries of PATH authority. In *Jacintoport*, 762 F.2d at 443 (emphasis in original), the Court quoted the following test for determining whether or not the state entity performs governmental functions:

> Although it has been said that the character and nature of municipal corporations remain at all times the same, [footnote omitted] *in their public or governmental capacity they act as the agent of the state for the benefit and welfare of the state as a whole, but when acting for the peculiar and special advantage of their inhabitants, rather than for the good of the state at large, they act in a private or proprietary capacity.*

Here, the Port Authority and PATH are acting for the special advantage of the residents of the Port District, a 1,500 square mile area in the New York Harbor area. Accordingly, under the test articulated in *Jacintoport*, PATH is performing a proprietary, or local function. *Jacintoport*, 762 F.2d at 443 (the Port Authority's concern was the Baton Rouge Port and it was, therefore, not performing a statewide or governmental function).

In short, the secondary factors preponderate against immunity. The statutory language uses terminology that convey an intent to create an entity akin to a political subdivision. Although there is some oversight by the states over PATH, the indicia of independence—*e.g.*, the power to sue and be sued; to purchase, lease and sell real property; and to enter into contracts—coupled with the states' need to engage in litigation in an attempt to impose their will, overwhelmingly tilts the balance of these secondary factors against Eleventh Amendment immunity.

CONCLUSION

For the reasons set forth above, RLEA submits that the decision of the Third Circuit should be reversed.

Respectfully submitted,

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